

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1225

To be argued by
LEE S. RICHARDS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1225

UNITED STATES OF AMERICA,

Appellee,

—v.—

ERROL G. O'SAVIO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

LEE S. RICHARDS,
RICHARD WEINBERG,
*Assistant United States Attorneys
Of Counsel.*



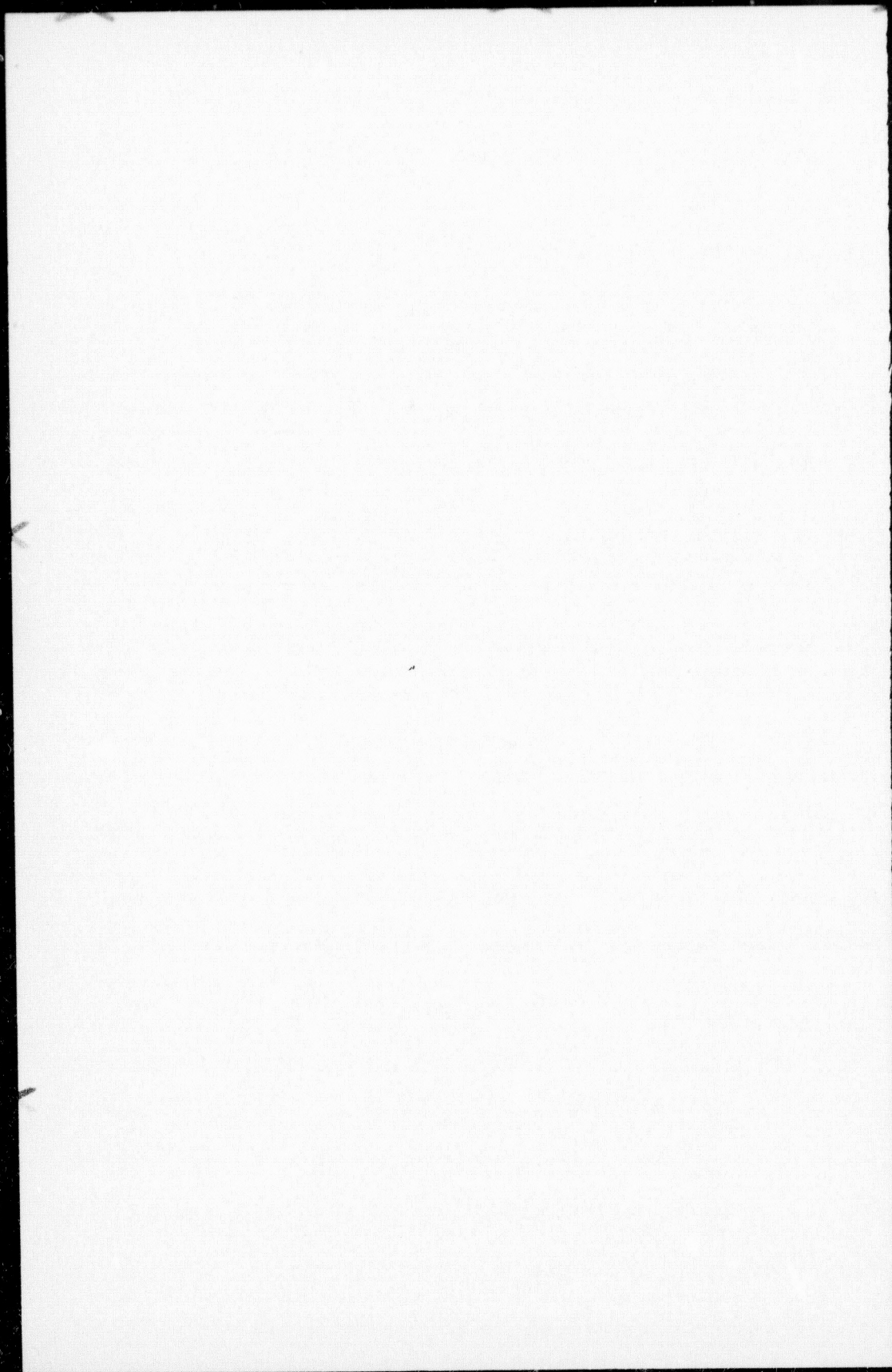


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
I. Summary	2
II. The Government's Case	2
III. The Defendant's Case	7
ARGUMENT:	
POINT I—The District Court's Charge on "Em- bezzlement" and "Abstraction" Was Entirely Proper	9
POINT II—The District Court's Charge On The In- terests of Witnesses Was Proper In All Respects	14
CONCLUSION	18

TABLE OF AUTHORITIES

Cases:

<i>Anders v. California</i> , 386 U.S. 738 (1967)	2
<i>Cupp v. Naughten</i> , 414 U.S. 141, 146-47 (1973) ...	12
<i>Henderson v. Kibbe</i> , — U.S. —, 97 S.Ct. 1730 (1971)	11
<i>United States v. Daniels</i> , 558 F.2d 122, 127 (2d Cir. 1977)	17
<i>United States v. Floyd</i> , 555 F.2d 45, 47 & n.4 (2d Cir. 1977)	17
<i>United States v. Fury</i> , 554 F.2d 522, 527 n.4 (2d Cir. 1977)	11
<i>United States v. Glazer</i> , 532 F.2d 224 (2d Cir.), cert. denied, — U.S. — (1976)	13

	PAGE
<i>United States v. Guillette</i> , 547 F.2d 743, 750 (2d Cir. 1976)	12
<i>United States v. Hanlon</i> , 548 F.2d 1096 (2d Cir. 1977)	12
<i>United States v. Hendrix</i> , 542 F.2d 879, 882-83 (2d Cir. 1976), <i>cert. denied</i> , — U.S. — (1977)	11
<i>United States v. Indiviglio</i> , 352 F.2d 276 (2d Cir. 1965) (<i>en banc</i>), <i>cert. denied</i> , 383 U.S. 907 (1966)	11
<i>United States v. Kahaner</i> , 317 F.2d 459 (2d Cir.), <i>cert. denied</i> , 375 U.S. 836 (1963)	14
<i>United States v. Magnano</i> , 543 F.2d 431, 435 (2d Cir. 1976), <i>cert. denied</i> , — U.S. — (1977)	12
<i>United States v. Mahler</i> , 363 F.2d 673, 678 (2d Cir. 1966)	17
<i>United States v. Martin</i> , 525 F.2d 703, 706 (2d Cir.), <i>cert. denied</i> , 423 U.S. 1025 (1975)	17
<i>United States v. Martinez-Carcano</i> , 557 F.2d 967 (2d Cir. 1977)	11
<i>United States v. Monteill</i> , 526 F.2d 1008 (2d Cir. 1975)	13
<i>United States v. Reid</i> , 517 F.2d 953 (2d Cir. 1975)	14
<i>United States v. Tolkow</i> , 532 F.2d 853, 859 (2d Cir. 1976)	17
<i>United States v. Tyers</i> , 487 F.2d 828, 831 (2d Cir. 1973), <i>cert. denied</i> , 416 U.S. 971 (1974)	17
 <i>Rules:</i>	
Fed. R. Crim. P. 30	11, 18

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1225

UNITED STATES OF AMERICA,

Appellee,

—v.—

ERROL G. O'SAVIO,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Errol G. O'Savio appeals from a judgment of conviction entered on December 28, 1976, in the United States District Court for the Southern District of New York, after a three day trial before the Honorable Dudley B. Bonsal, United States District Judge, and a jury.

Indictment 76 Cr. 836, filed on August 26, 1976, charged O'Savio with thirty-four counts of bank embezzlement, in violation of Title 18, United States Code, Section 656.

Trial commenced on November 9, 1976. On November 11, 1976 the jury returned a verdict of guilty on each of the thirty-four counts of the indictment. On December 28, 1976, Judge Bonsal sentenced O'Savio to a term of two years in prison on each count, to be served concurrently.

On May 31, 1977 trial counsel for O'Savio submitted an affidavit stating that there were no non-frivolous issues for appeal. *Anders v. California*, 386 U.S. 738 (1966). However, on September 1, 1977 O'Savio moved to strike his previous motion and that relief was granted.

The defendant is at liberty pending this appeal.

Statement of Facts

I. Summary

From November 1974 through March 1976 the defendant Errol O'Savio, embezzled approximately \$112,000 while employed as a teller at the National Bank of Westchester. The sources of the embezzled funds were tax deposit payments made by business customers of the bank. On at least 34 occasions when these business customers brought their tax payments to the defendant for deposit he debited their checking account but failed to make the corresponding deposit to the designated United States Treasury account. The defendant withdrew these undeposited funds from his cash drawer before the end of the day. To allay suspicions and to take advantage of the delay in discovery of the discrepancies by the Internal Revenue Service the defendant made deposits of the tax payments to the Treasury account weeks and months later. At the same time he withheld deposit of newly received tax payments, usually in a larger amount. Thus at the point when the defendant was discharged from the bank he had returned about \$72,000 of the funds leaving a balance outstanding of about \$40,000 in embezzled funds.

II. The Government's Case

While employed as a teller with the National Bank of Westchester, the defendant received deposits of corporate, excise and employee withholding tax payments

from bank customers. (Tr. 13-23; GX 63, 64).^{*} The bank was designated as a depository agent for the Internal Revenue Service. The customer would present to the defendant a check made payable to the bank with a "TTL" ^{**} card furnished by the Internal Revenue Service. Instead of processing the check through normal banking channels, O'Savio converted to his own use the cash proceeds of the check. O'Savio further manipulated the bank records to disguise his embezzlement.

Proper bank procedure required the defendant to stamp the TTL card, and process the transaction on his adding machine.^{***} To process the payment the defendant was supposed to make an appropriate entry on bank records to evidence the deposit of the tax payment, the debit to the customer's account, and the credit to the Treasury's account. According to bank terminology the defendant should "cash out" the payment (imprinting the back of the check with a legend) and then "cash in" the same amount on the teller tape. (Tr. 34-44).

The checks deposited by the customer are then added to the cash-out work of the teller and are sent to the bank's transit department^{****} for processing and micro-

^{*} "Tr." refers to pages in the official transcript. "GX" refers to Government exhibits; "DX" refers to defense exhibits.

^{**} "TTL" is an abbreviation for Treasury Tax and Loan and is the designation used by the bank and the IRS to describe the tax deposit payment account. (Tr. 34). A depositor who wants the bank to apply a particular deposit to the Internal Revenue Service must submit the "TTL" card with the deposit.

^{***} The teller tape which is locked in each teller's adding machine and removed every five days constitutes the record of all transactions processed by a teller on a given day. (Tr. 41-42). The date is changed on the machine by the bank's branch control officer each morning in the presence of the teller. (Tr. 44). Each teller is assigned his own teller tape for his exclusive use. No two bank tellers have the identical number. (Tr. 41-43).

^{****} The transit department is the bank's service center for processing all checks, deposits and other paper work received from the branches. (Tr. 38).

filming. The TTL cards are sent to the bank's transfer department where a daily report of all tax deposit payments made to the various branches of the bank is generated. This report is addressed to the Federal Reserve Bank and serves as a transmittal letter for the TTL cards that have been received and processed by the transit department that day.* If the Internal Revenue Service does not receive a TTL card within a certain period of time it will notify the company that its records do not reflect receipt of the tax payment due. (Tr. 34-41).

On at least thirty-four occasions a treasury tax payment had been made to the bank by a customer on a particular date but the defendant converted the proceeds of that check to his own use. O'Savio removed from his cash drawer the money represented by these checks. He then debited the customer account and placed the appropriate "cash-out" entry on his tape. The defendant, however, made no corresponding "cash-in" entry on his teller's tape, and did not send through regular banking channels the documents necessary to credit the Treasury account with the payments made by the bank customer. By so manipulating the bank records and the cash in his drawer, O'Savio was able to steal \$112,000 in a year and one-half.

In eight instances the defendant never credited the Treasury account. Instead he embezzled these funds, totalling approximately \$40,000. On twenty-six other occasions O'Savio embezzled the money, totalling approximately \$72,000, used it for his own purposes, and even-

* After the TTL cards have been recorded on the transmittal letter, but before being sent to the Federal Reserve Bank, they are routed to the transit department for processing and microfilming. An operator in the transit department totals up the TTL card payments and makes a comparison with the figures on the transmittal letter. (Tr. 37).

tually returned the money to the bank and credited the Treasury account. These clearly unlawful "loans" made by O'Savio to himself had a duration from seven days to four months. (Tr. 128, 130-31).

The Government established O'Savio's participation in this embezzlement scheme through the testimony of two bank witnesses—Robert Huie, a bank auditor, and Virginia Higgins, an officer at the branch where O'Savio worked. Huie and Higgins described the bank procedures used to insure that the United States Treasury was properly credited and that it expeditiously received deposits made by bank customers who intended that the deposits be utilized to pay a federal tax liability. Each witness further demonstrated the bank procedures employed to keep track of the deposits and withdrawals made to and from a particular teller.* (Tr. 33-59; 157-66).

More specifically, Robert Huie testified that each of the transactions set forth in the indictment was processed as a cash-out and/or cash-in item on a teller tape which had been assigned to the defendant for his exclusive use. (Tr. 41-43). Huie further explained that as to the deposit payments involved in Counts Twenty-Seven through Thirty-Four a search of all relevant bank records revealed that no cash-in or credit of these payments to the Treasury account was ever made. (Tr. 128, 130-31). With respect to the tax deposit payments involved in Counts

* The bank officials explained that each teller receives a stamp and slug for his particular teller's machine. Thus the bank can establish which teller was responsible for a particular transaction. Whenever a teller is away from his station he must remove the slug, lock the machine and place his stamp and slug into his cash drawer which is also locked. (Tr. 44-45, 161, 164-65, 167-69). Neither of these experienced bank officials could recall a situation where a bank teller left his machine unattended with the stamp and slug still in the teller's machine. (Tr. 146-47, 164-69).

One through Twenty-Six he testified that the TTL cards were subsequently cashed in on the teller's tape, processed by the transit department and were reflected on the transmittal letter to the Federal Reserve Bank at dates ranging from seven days to almost four months from the time the tax payments were made. (Tr. 128, 130-31).

The last Government witness—James Keefe—testified that he had interviewed O'Savio concerning three questioned deposits. (Tr. 171, 173, 175). At first, O'Savio denied any illegal involvement with these deposits. Later, O'Savio altered his obvious prevarication and told Keefe that he had given the money from each of those deposits to a friend. (Tr. 175). He signed a two page statement acknowledging his guilt as to these deposits. (Tr. 175-76; GX 62).

* Huie's testimony was summarized in two charts—GX 63 and GX 64. Government Exhibit 63 showed for each count the name of the bank's customer, the amount of the tax deposit payment, the date when the payment was debited from the customer's checking account, the date when, if ever, the payment was finally credited to the United States Treasury tax account, and the identifying number of the teller who processed each transaction. (Tr. 131). Government exhibit 64 showed for each of seventeen dates involved in the indictment: (a) the amount of tax deposit payments debited from customer checking account where no corresponding immediate credit to the Treasury tax account was made; (b) the amount of tax deposits credited to the Treasury tax account where the corresponding debit had been made to the customer's checking account at an earlier date; and (c) the difference between the two. (Tr. 136). The total figures under heading (a)—\$111,595.19—represented the total monies embezzled by the defendant, and the total figures under heading (c)—\$39,297.67—represented the net amount of moneys embezzled and still outstanding at the time of the defendant's discharge from the bank.

III. The Defendant's Case

The defendant testified in his own behalf. In addition, he presented the testimony of Denise Carter, a former teller at the bank's Central Avenue branch, and Beatrice Bostic, a character witness.

O'Savio denied taking any money from the bank. While he acknowledged the bank's strict rules and procedures governing the use of the teller's tapes and adding machines,* he claimed those rules, particularly as to the treatment of teller slugs and stamps, were regularly violated. (Tr. 190-193, 231-216).**

O'Savio admitted that he had met with Keefe but he claimed that the only piece of paper he read or signed was a writing acknowledging his willingness to take a lie detector test. (Tr. 194-195).*** On cross-examination

* O'Savio acknowledged the strict rules about slugs and stamps and verified that the proper method for handling a tax deposit payment on the teller's tape would be to cash-out the item as a debit to the customer's checking account and to cash-in the TTL card as a credit to the Treasury account. He further acknowledged that if the teller neglected to cash in the TTL card on his tape, there would be a difference or surplus of cash in his drawer at the end of the day. (Tr. 202-204).

** For example, the defendant testified that on a busy day when the branch was short one teller he would take a fifteen minute lunch break. While he was out someone else would operate the machine at his station. In addition, as head teller at the branch he had to train the new tellers. If a problem developed over a difficult transaction the defendant would have to leave his station to solve the problem. According to the defendant, on a busy day when someone was working with the defendant at his station and there were still customers on line at his station when he moved away to assist another teller, that person who was helping him would take care of the customers' transactions. (Tr. 190-193).

*** O'Savio denied signing a statement admitting that he had taken three checks from the bank. (Tr. 206). He was quite

[Footnote continued on following page]

O'Savio admitted that it was his signature that appeared on the various teller stamps and slug issuing records (Tr. 198; GX-39A-39B-39C-39D), and that his signature appeared on each of the proof sheets received in evidence.* (Tr. 199; GX-40A through GX-40).

Denise Carter, a teller at the bank from 1974 to 1976, testified that there were times when a teller left his machine "even for a few minutes" with the slug still in the machine. (Tr. 237). However, she denied that tellers ever allowed other tellers to use their machines. (Tr. 238). She confirmed that the bank had strict rules about leaving stamps and slugs unattended. Both Ms. Carter and Ms. Higgins testified that they knew of no instance where auditors came around to the branch and wrote up a violation on a teller for not keeping custody of his or her slug. (Tr. 238-39). This contradicted O'Savio's testimony that bank inspectors had reprimanded tellers for leaving unattended stamps and slugs, and leaving the cash drawer open. (Tr. 197).

certain that Keefe did not write out in his presence or ask him to sign the two page statement introduced as GX 62. (Tr. 207). He recalled signing but one statement, which authorized Keefe to administer a lie detector test. (Tr. 208). However, he agreed that the last sentence and signature which appears at the bottom of the second page of GX 62 were in his handwriting. (Tr. 107). The Government then offered in evidence a one page completed form, dated March 29, 1976, consenting to a polygraph examination. The defendant admitted that his signature appeared toward the bottom of the page. It was received in evidence. (Tr. 208-209). The defendant was asked to initial a piece of paper (GX 68) which could be used by the jury to compare with the initials that appeared at several points on the two page statement of guilt. (GX 62; Tr. 229).

* A proof sheet is a balance sheet on which a teller balances the transactions he has handled for the day. (Tr. 33).

The Reverend Beatrice Bostic testified that she was the pastor of the Mount Olivet Apostolic Faith Church, Inc., in Mount Vernon, New York. She testified that she had known the defendant for three years, that he was a trustee of the Church and President of the men's department, and that his reputation for truth and veracity was good. Reverend Bostic was O'Savio's mother-in-law. (Tr. 240-242).

ARGUMENT

POINT I

"The District Court's Charge on "Embezzlement" and "Abstraction" Was Entirely Proper.

O'Savio contends that the jury was not properly charged on the definitions of "embezzlement" and "abstraction." He argues that Judge Bonsal's instructions usurped from the jury their right to determine if the defendant "embezzled" or "abstracted" money from the bank. This argument distorts the District Court's charge to the jury. The charge unambiguously informed the jury as to the essential elements of the crime cognizable by Title 18, United States Code, Section 656, and clearly instructed the jury that whether the defendant embezzled or abstracted bank funds was a disputed issue which only the jury could resolve.

At the outset, Judge Bonsal informed the jury that they were the exclusive triers of the facts, and that their recollection of the facts and not that of the Court or the attorney's controlled. (Tr. 285). He explained that the Government was required to prove each element comprising the crime beyond a reasonable doubt before the defendant could be convicted. (Tr. 286). Judge Bonsal then

fairly and accurately summarized the contentions of both the Government and the defendant, making it quite clear that the Government *contended* that O'Savio had embezzled the bank funds. (Tr. 278-79). The District Court enunciated the elements of the offense, instructing the jury that "to find the defendant guilty the Government must prove beyond a reasonable doubt each of the elements." (Tr. 291).

In order to help the jury focus on the critical issue, Judge Bonsal went on to instruct them that:

"There is a serious dispute as to the other two items. One is that the defendant embezzled or abstracted the money and the second one is that he was acting knowingly, wilfully and unlawfully. Those are really the two significant elements here as to which there is a great dispute." (Tr. 292).

After this instruction which lucidly informed the jury that the questions of whether O'Savio embezzled or abstracted the money and whether he acted wilfully and knowingly were sharply contested issues at the trial, Judge Bonsal offered the following explanatory comment:

"You remember I mentioned embezzled. What is embezzled? Well, embezzled here simply means that the money came into the defendant's hands unlawfully. He was a teller at the bank and this was his job, to collect these items, and that he converted the money to his own use. That is embezzled. He received the money lawfully as a teller at the bank, it was the bank's money, and he converted it to his own use.

Then there is abstract. What does abstract mean as used in the statute? Well, again all that means is that the defendant received the money as a teller, an employee of the bank, and then he

took the money away without the bank's knowledge or consent. In other words, he deprived the bank of the money. It is sort of two ways of saying the same thing, really, but the statute uses embezzled and abstract." (Tr. 292).

O'Savio rounds out his meritless argument by further contending that when Judge Bonsal next gave his perfectly proper charge on knowledge and wilfulness (Tr. 293-294) he entered a partial verdict of guilt on the issue of embezzlement and abstraction. In sum he claims that the above quoted language told the jury that O'Savio had embezzled or abstracted the money, thus removing the issue from the jury's consideration.

O'Savio raises for the first time on this appeal the claim that Judge Bonsal's charge defining embezzlement and abstraction was improper. The failure to object not only constitutes a waiver of the point absent plain error,* but vividly demonstrates the weakness of the argument. Although defense counsel attacked other parts of the charge, he made no objection to the embezzlement or abstraction portions of the jury instructions. It is fanciful to suggest that in a case where defense counsel strenuously argued that no embezzlement had occurred he would have stood mute as the court improperly charged the jury on that issue.

* Rule 30 of the Federal Rules of Criminal Procedure explicitly states that:

"No party may assign as error any portion of the charge or omission therefrom unless he object thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

See also, *Henderson v. Kibbe*, — U.S. —, 97 S. Ct. 1730 (1971); *United States v. Martinez-Carcano*, 557 F.2d 967 (2d Cir. 1977); *United States v. Fury*, 554 F.2d 522, 527 n.4 (2d Cir. 1977); *United States v. Hendrix*, 542 F.2d 879, 882-83 (2d Cir. 1976), cert. denied, — U.S. — (1977); *United State sv. Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), cert. denied, 383 U.S. 907 (1966).

Moreover, the charge when read as a whole was entirely fair and correct.* Judge Bonsal clearly and repeatedly informed the jury that they were to decide whether the defendant "embezzled" or "abstracted" the money. Indeed immediately prior to the language defendant now contends was faulty, Judge Bonsal characterized the issue of embezzlement as "a serious dispute" in the case. Immediately following the complained about language Judge Bonsal stated that "the Government contends, and of course the defendant denies, with respect to each of these counts that the money involved here came into the control of the defendant as a teller." (Tr. 292). Finally the District Court emphatically informed the jury that the Government had to prove beyond a reasonable doubt that O'Savio embezzled or abstracted the money and that it was simply the Government's *contention* that O'Savio had embezzled the money.

Thus, the District Court's charge when read in its entirety did not instruct the jury that the defendant had embezzled the money, nor did it instruct that the only issue was whether O'Savio had acted knowingly and willfully. The language O'Savio belatedly complains about was simply an effort to explain in readily comprehensible language what the legal terms embezzlement and abstraction mean. In view of the instructions prior to and after this language, the claim that Judge Bonsal usurped from the jury its responsibility to decide whether O'Savio embezzled or abstracted the funds is totally unfounded.

* It is well settled that the trial court charge should be read as a whole. *United States v. Hanlon*, 548 F.2d 1096 (2d Cir. 1977); *United States v. Guillette*, 547 F.2d 743, 750 (2d Cir. 1976); *United States v. Magnano*, 543 F.2d 431, 435 (2d Cir. 1976), *cert. denied*, — U.S. — (1977); see generally *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973).

O'Savio further contends that the District Court gave an inconsistent instruction when the court stated that "embezzled here simply means that the money came into the defendant's hands unlawfully," and then stated a few sentences later that "he received the money lawfully as a teller at the bank, it was the bank's money, and he converted it to his own use." (Tr. 292). Apparently O'Savio claims that the initial language on embezzlement—that the defendant had the money unlawfully—is erroneous, and inconsistent with the later language. Of course this rather tardy effort to scrutinize each word of the charge in order to find the slightest of inconsequential error must fail.

From the entire charge the jury fully understood that O'Savio as a bank teller lawfully had money in his possession. The question was whether he then illegally converted that money to his own use—whether he embezzled the money.

The fact is that the money was eventually in his hands. Whatever slight inaccuracy there may be in the court's initial, shorthand reference to embezzlement was surely cured by the careful definition of that phrase that immediately followed. At the very worst, the court's initial reference to embezzlement was an inadvertent and minute slip.* Inadvertent statements of greater consequence have been held to be harmless. *United States v. Glazer*, 532 F.2d 224 (2d Cir.), *cert. denied*, — U.S. — (1976); *United States v. Monteill*, 526 F.2d 1008 (2d Cir. 1975);

* Of course the instruction that "embezzled here simply means that the money came into the defendant's hands unlawfully" probably meant no more than the jury had to determine if at some point the bank funds unlawfully came into O'Savio's possession.

United States v. Kahaner, 317 F.2d 459 (2d Cir.), cert. denied, 375 U.S. 836 (1963).*

POINT II

The District Court's Charge On The Interest Of The Witnesses Was Proper In All Respects.

O'Savio contends that Judge Bonsal's charge on the interest of the witnesses constituted reversible error. According to O'Savio, the trial court's reference to the testimony of O'Savio and Beatrice Bostic, a character witness,

* The decision in *United States v. Reid*, 517 F.2d 953 (2d Cir. 1975) heavily relied on by O'Savio in advancing this claim is simply inapposite. In *Reid* the trial judge had charged that a violation of 18 U.S.C. § 924(c)(1) (unlawful use of a firearm in the commission of a federal felony) existed if, but only if, the jury found the revolver in question had been used in one of the felonies charged in other counts of the indictment. The Court had vacated the conviction under one of those other counts so the question arose whether the Court could determine if the jury had relied on the improper charge that they could convict if they found the firearm to have been used with respect to the vacated count only. The Court in *Reid* noted the rule that

"[w]here two instructions are given to the jury, one erroneous and prejudicial and the other correct, it is impossible to tell which one the jury followed and it constitutes reversible error. . ." *Reid, supra*, 517 F.2d at 965.

This Court nevertheless affirmed. All the elements of the crime charged in the first count in *Reid*, a count on which the jury convicted and the Court affirmed, covered the elements required under the firearms count.

The inconsistent instructions embodied in the charge in *Reid* are hardly analogous to the minute semantic inconsistency in the charge at issue on this appeal. Judge Bonsal clearly cured whatever slight misunderstanding the jury may have had by thoroughly explaining that the money was initially in O'Savio's hands lawfully but that, in order to convict, the jury must find that he converted it to his own use.

was improper in light of the court's refusal to comment on the interest of government witnesses Robert Huie and Virginia Higgins.

O'Savio's trial counsel did not object to the instruction on the interest of the defendant or the character witness. His only objection was to the failure to charge on the interest of Huie and Higgins. (Tr. 303).*

As with his argument on embezzlement and abstraction O'Savio points to isolated portions of that jury's instructions and significantly omits relevant portions. Judge Bonsal quite properly referred to the interest of O'Savio and Bostic, but he also gave additional and significant instructions on credibility:

"You ladies and gentlemen, as the jury are the exclusive judges of the credibility of the several witnesses who appear before you. *You subject*

* In making this claim, O'Savio relies on the following portion of Judge Bonsal's charge on credibility:

"You consider whether a witness has an interest in the case. You heard a lady testify, a character witness, yesterday, Mrs. Bostic. I think you remember. She testified she was the defendant's mother-in-law for the last month or something like that. There is a family relationship and that is an interest, of course, that you might consider. Of course that doesn't mean that any witness will mislead you because he or she has an interest, it is merely a factor for you to consider in determining the credibility of that witness.

Then Mr. O'Savio took the stand and he testified. Obviously he has a very important interest in the outcome of this case and his interest, of course, is something you would consider in connection with the credibility which you give to his testimony, but of course here again it is quite within your province if you should so decide to conclude that Mr. O'Savio was telling the complete truth despite his interest in the outcome." (Tr. 299).

all their testimony to the same standards, whether they were called by the Government or whether they were called by the defendant.

Of course, it is not the number of witnesses, it is the quality of the testimony which is important, the testimony which you think most likely represented the true picture of what happened here.

How do you determine the credibility of these witnesses? Well, here again, ladies and gentlemen, use your plain everyday common sense. You saw them testify. How did their stories impress you? Did you think they were testifying frankly, candidly, fairly? Apply your common sense and experience just as you do when you are called upon to decide an important matter in your own life, when you were called upon to decide whether you have been given a true picture of a particular situation.

I think you consider a witness' demeanor, you take into account his background, his occupation or business. You consider a witness' candor or lack of it, a witness' possible bias, the accuracy of his recollection and you will consider whether you find a witness' testimony is supported or whether you find it to be contradicted by other credible testimony or evidence" [emphasis added] (Tr. 298-99).

In addition, after referring to the interest of Bostic and O'Savio, Judge Bonsal carefully noted that their interest was no bar to the jury's believing all of the testimony of those witnesses. That instruction, coupled with the general instructions which O'Savio fails to quote, clearly explained to the jury the proper test to be applied

to these witnesses.* The giving of a charge on the interests of one or more defense witnesses does not require a specific reference to a government witness's interest. The charge on the special interest of the defendant, whether or not there is specific reference to the interest of government witnesses, has been repeatedly upheld. *United States v. Tolkow*, 532 F.2d 853, 859 (2d Cir. 1976); *United States v. Martin*, 525 F.2d 703, 706 (2d Cir. 1975), *cert. denied*, 423 U.S. 1025 (1975); *United States v. Tyers*, 487 F.2d 828, 831 (2d Cir. 1973), *cert. denied*, 416 U.S. 971 (1974).

While courts in this circuit typically instruct on the interest of an accomplice witness,** no case has suggested that a special interest instruction is needed as to a private citizen who is not an accomplice. It would be extraordinary to adopt such a rule in this case. Huie and Higgins were simply bank employees. It can hardly be argued that their interest in any way approached that of an accomplice witness. Any motive to fabricate in order to convict O'Savio would be extraordinarily remote. Indeed

* The case on which O'Savio relies, *United States v. Mahler*, 363 F.2d 673, 678 (2d Cir. 1966) does not purport to set out any formula for judging instructions on credibility. In *Mahler* this Court upheld an instruction containing the following language:

"... it is perfectly obvious to all of you the man in this case with the deepest, greatest interest is the defendant himself."

Reading Judge Bonsal's entire charge, it is clear that the factors on which the Court in *Mahler* relied in affirming the conviction are all present here. Judge Bonsal emphatically instructed the jury that interest alone doesn't make testimony incredible, that the tests for judging credibility should be applied to *all* witnesses, and that it was for the jury to decide which witnesses to believe. Finally, the Court in *Mahler* held that the charge itself was proper.

** This Court in *United States v. Daniels*, 558 F.2d 122, 127 (2d Cir. 1977) reiterated its preference that trial judges charge the jury that accomplice testimony should be scrutinized with special care and caution. The Court did not reverse the conviction despite the failure to give the charge. See also *United States v. Floyd*, 555 F.2d 45, 47 n. 4 (2d Cir. 1977).

defense counsel understood the futility of arguing that Huie and Higgins had a motive to fabricate in order to incriminate O'Savio.* Counsel never argued in his summation that Huie and Higgins were not telling the truth (Tr. 274-80), and his cross-examination never probed either witness on the question of motive to fabricate or interest in the outcome of the trial. (Tr. 142-57, 166-70).

In sum Judge Bonsal properly instructed the jury that they were the exclusive judges of a witness's credibility, and that all witnesses are subject to the same standards. His special mention of the defendant and Beatrice Bostic was entirely proper and the failure to mention specifically the bank witnesses was correct.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

LEE S. RICHARDS,
RICHARD WEINBERG,
*Assistant United States Attorneys,
Of Counsel.*

* It should be noted that O'Savio never submitted a proposed instruction in accordance with Rule 30, Federal Rules of Criminal Procedure relating to the special interest of Huie and Higgins. He did submit a proposed instruction on circumstantial evidence. (Tr. 255).

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Lee S. Richard being duly sworn,
deposes and says that he is employed in the office
of the United States Attorney for the Southern District
of New York.

That on the *31st* day of *October*
19 *71*, he served a copy of the within
by placing the same in a properly postpaid franked
envelope addressed:

Alton H. Maddox, Jr., Esq.
126 West 119 Street
New York, New York

1002

And deponent further says that he sealed the said
envelope and placed the same in the mail box for mail-
ing at One St. Andrew's Plaza, Borough of Manhattan,
City of New York.

Lee S. Richard

Sworn to before me this
31st day of *October*, 19*71*
Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 19*72*

